IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

RUSSELL T. NEAL,

Plaintiff,

v. **Case No.: 3:06cv17/MCR/EMT**

OFFICER BOLTON and
DOCTOR HART,

Defendants.
_____/

SPECIAL REPORT

Defendant Officer Bolton provides the following information, defenses, and arguments in accordance with this Court's Orders entered August 6, 2007 (Doc. 32) and November 20, 2007. (Doc. 48).

Defendant Officer Bolton respectfully requests dismissal of Plaintiff's claims for the reasons stated below. Alternatively, Defendant Officer Bolton requests that summary judgment be entered in his favor.

Defendant Officer Bolton further requests leave of Court to supplement this Special Report once all of Plaintiff's medical records are obtained from his providers. Despite Plaintiff's cooperation in providing releases to secure the medical records concerning the treatment and condition of his right eye, counsel for

Defendant Officer Bolton has not yet secured all of these records. The Court, recognizing the importance of such records to the analysis of the Plaintiff's claims in this case, previously granted Officer Bolton an extension of time to file his Special Report. (Doc. 45). Before filing this Special Report, Officer Bolton filed another request for extension of time (Doc. 51), which was not yet ruled upon at the time the deadline ran for the filing of this Special Report. Accordingly, Officer Bolton incorporates that request for further extension of time as part of this Special Report, and further requests leave of Court for the good cause shown in the Motion for Extension of Time, (Doc. 51), so he may file a supplement to his defenses as may be necessary.

I. Background

Plaintiff, proceeding *pro se* and *in forma pauperis.* (Doc. 1, 10, 12, 20, 22), has filed a Fourth Amended Civil Rights Complaint pursuant to 42 U.S.C. § 1983. (Doc. 22). The Plaintiff has not exhausted his administrative remedies with respect to his excessive force claim against Officer Bolton and dismissal is warranted. Alternatively, summary judgment is also appropriate because Officer Bolton is not a proper defendant and because Plaintiff's medical records do not show that his alleged injury is connected with any alleged conduct by Officer Bolton.

Plaintiff is a state inmate currently incarcerated at the Calhoun Correctional Institution in Blountstown, Florida. (Doc. 22). His Fourth Amended Complaint addresses incidents alleged to have occurred at the Okaloosa County Detention

Center ("Okaloosa County Jail" or "OCJ"). (Id.). There are two defendants, Officer Bolton and Dr. Hart. (Id. at 2)

Plaintiff alleges he was incarcerated at OCJ from April 30, 2003 through January 28, 2004, and again in 2005. He had several pre-diagnosed medical problems prior to being incarcerated including eye, back, and shoulder problems. He informed medical and correctional staff of his medical needs and related physical limitations, including a diagnoses of glaucoma made on or about August 2002 by Dr. Shawn Hamilton of the Hamilton Eye Institute. Plaintiff indicated he needed surgery on his right eye and provided information on prescription medications he needed - "Cosupt and Pilocarpine." (Id. at ¶ 8). Plaintiff also advised of all health care professionals he had treated with. Despite this notice, Plaintiff was deprived of medications including eye drops for glaucoma. (Id. at ¶ 10). In May 2003, Plaintiff informed Defendant Dr. Hart that OCJ did not have the proper equipment to treat his glaucoma and that he needed surgery on his right eye. (Id. at ¶¶ 11-12). Dr. Hart assured Plaintiff he would receive required eye medication. (Id. at ¶¶ 13-14). From May 4, 2003 through September 1, 2003, Plaintiff complained to every shift during sick call that he needed medication for his eye. (Id. at ¶ 15). Plaintiff received no eye medication from April 30, 2003, into August 2003 - a period of over one-hundred (100) days. (Id. at ¶¶ 18-19). Plaintiff experienced excruciating and debilitating pain, and grieved of pain, fear of blindness, and lack of care and concern by staff. (Id. at ¶¶ 19-20). Plaintiff

complained that he needed specialized medical care as well as prescription lenses and eye surgery. (Id. at ¶¶ 21-23). Plaintiff's glasses were seized upon his arrest and they were not returned until approximately August 24, 2004. (Id. at ¶ 23). By Plaintiff's account, the damage had already been done to his eye by this time. (Id.). Before having his glasses returned, Plaintiff procured other prescription lenses of improper prescription. (Id. at ¶ 24).

Plaintiff was provided ice packs to relieve the pain in his right eye caused by deprivation of glaucoma medication, but this was ineffective. (Id. at ¶ 25). Plaintiff informed staff of his rapid visual loss and pain on a daily basis, which was recorded by nurses in Plaintiff's medical records. (Id. at ¶ 26). Plaintiff was taken to the Hamilton Eye Institute on or about August 26, 2003, and a prescription for corrective lenses and eye medication was written; but neither the prescription lenses nor the eye medication were immediately provided to Plaintiff. (Id. at ¶ 27). Plaintiff eventually received the new corrective lenses, but had to file a grievance to receive the medication even though staff knew how much pain Plaintiff was in. (Id. at ¶ 28). In the interim, Plaintiff's criminal defense attorney, Michael D. Weinstock, retrieved an old bottle of eye medication from Plaintiff's home and brought it to OCJ, but it was lost by OCJ staff and only located after more grievances were filed by Plaintiff. (Id. at ¶¶ 29-30). In all, it was approximately one-hundred and twenty (120) days before Plaintiff was able to treat with his eye care specialist or receive necessary eye medication.

During his incarceration at OCJ, Plaintiff was also illuminated by a hand-held laser beam used by OCJ staff for entertainment. (Id. at ¶ 32). Officer Auford threatened Plaintiff that he would target such a laser in Plaintiff's eye. The parties dispute Plaintiff's assertion that Officer Bolton shot a hand-held laser targeting device across Plaintiff's upper body while the Plaintiff was drying himself in the shower area of "E" Pod. (Id. at ¶ 34). By Plaintiff's account, the laser beam of light struck Plaintiff in his right eye. (Id. at ¶ 35). The laser beam burned a "cheerio shaped" sore upon the center of Plaintiff's retina. (Id. at ¶ 36). Scar tissue formed on Plaintiff's retina, but maintained the "cheerio shape" associated with damage produced by a laser. (Id. at ¶¶ 37-38). Officer Bolton maintains that he did not shine any laser beam on Plaintiff or into his eye, and that his only knowledge of Plaintiff's allegations came as a result of reading Plaintiff's allegations in Plaintiff's "Notice of Claim" that he submitted prior to filing suit. (Memorandum summarizing investigatory by Captain C. Morash regarding Plaintiff's allegations from his "Notice of Claim," which are the same excessive force allegations stated in the Fourth Amended Complaint, attached as Exhibit "A"; Affidavit from Officer Bolton will be filed as soon as it can be obtained).

Plaintiff's medical condition upon leaving OCJ in January 2004 may be disputed upon receipt of Plaintiff's medical records from numerous medical providers. This may form the basis of an argument on summary judgment that natural degeneration is the cause of Plaintiff's eye problems and not anything

caused by a laser beam. By Plaintiff's account, upon leaving OCJ on or about January 28, 2004, he could no longer see the eye chart without looking away from the chart and using his peripheral vision. (Id. at ¶ 39). The first eye doctor to see the burn on Plaintiff's retina was Dr. Tugwell at Walton CI, who observed the burn when conducted an inner ocular examination. (Id. at ¶ 40). "No other macular degeneration was present." (Id.). Dr. Tugwell referred Plaintiff to a retina specialist, Dr. Schlofman, who examined Plaintiff's retina and declared it to be "shot out." (Id. at ¶¶ 40-41).

Plaintiff was later examined by Dr. Romchuk, but in the interim was beaten by officers at Walton CI during which Plaintiff's optical nerve became detached. (Id. at ¶ 43). Plaintiff's retina was found to be inoperable, and the burn to Plaintiff's retina is permanent and irreversable. (Id. at ¶¶ 43-44). Plaintiff's loss of his center field of vision directly relates to his retina being burned by being shot in the eye with a hand-held laser targeting device by Officer Bolton. (Id. at ¶¶ 45, 51). Although a healthy eye is temporarily blinded by a laser targeting device, Plaintiff's glaucoma, which went untreated, made him susceptible to permanent injury from the laser. (Id. at ¶¶ 47-50, 55). When Plaintiff returned to OCJ in January of 2005, medical staff withheld his medications. (Id. at ¶ 59).

Plaintiff claims that Dr. Hart denied prompt and necessary medical care in violation of the Eighth and Fourteenth Amendments. (Id. at ¶¶ 61, 64-66, p. 34). Plaintiff further claims that Officer Bolton used excessive force in violation of the

Eighth Amendment. (Id. at ¶¶ 62, 67-73, p. 34).

As relief, Plaintiff seeks compensatory and punitive monetary damages, as well as medical care should treatment develop to address his condition, and an order banning use of lasers at OCJ. (Id. at p. 34).

Defendant Officer Bolton presents the information in this Special Report and respectfully requests dismissal of Plaintiff's claim of excessive force, or alternatively summary judgment, for the reasons stated below.

II. Special Report

A. Failure to exhaust administrative remedies

Plaintiff has failed to exhaust administrative remedies prior to making his excessive force claim against Defendant Officer Bolton.

Title 42 U.S.C. § 1997e provides in relevant part: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Thus, exhaustion of all available administrative remedies is mandatory, and is a pre-condition to suit. Porter v. Nussle, 534 U.S. 516, 122 S.Ct. 983, 988, 152 L.Ed.2d 12 (2002) (citing Booth v. Churner, 532 U.S. 731, 739, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001)). The purpose of this exhaustion requirement is to reduce the quantity and improve the quality of prisoner suits. Porter, 534 U.S. at 524.

The exhaustion requirement applies to all inmate suits about prison life,

whether they involve general circumstances or particular episodes, and whether they allege excessive force of some other wrong. Porter, supra. Exhaustion is required whether Plaintiff seeks declaratory and injunctive relief, monetary damages, or both. Booth, 532 U.S. 731; see also Zolicoffer v. Scott, 55 F.Supp.2d 1372, 1375 (N.D.Ga.1999), aff'd, 252 F.3d 440 (11th Cir.2001). The requirement is not subject to either waiver by a court or futility or inadequacy exceptions. See Booth, 532 U.S. at 741 n. 6; McCarthy v. Madigan, 503 U.S. 140, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992) ("Where Congress specifically mandates, exhaustion is required."); Alexander v. Hawk, 159 F.3d 1321, 1325-26 (11th Cir.1998). Based on the foregoing, this court must dismiss a claim if it determines that Plaintiff failed to exhaust his administrative remedies with respect to that claim prior to filing suit. Higginbottom v. Carter, 223 F.3d 1259, 1261 (11th Cir.2000); Alexander, 159 F.3d at 1325-26.

The PLRA also "requires proper exhaustion." Woodford v. Ngo, 548 U.S. ----, 126 S.Ct. 2378, 165 L.Ed.2d 368, 2006 WL 1698937, at *7 (2006). In order to properly exhaust his claims, a prisoner must "us[e] all steps" in the administrative process; he must also comply with any administrative "deadlines and other critical procedural rules" along the way. Id. at *5 (internal quotation omitted). If a prisoner fails to complete the administrative process or falls short of compliance with procedural rules governing prisoner grievances, he procedurally defaults his claims. Johnson v. Meadows, 418 F.3d 1152, 1159 (11th Cir.2005), cert. denied, 548 U.S.

----, 126 S.Ct. 2978, --- L.Ed.2d----, 2006 WL 1788335 (2006). Thus, an untimely grievance does not satisfy the exhaustion requirement of the PLRA. Id. at 157.

Grievances submitted by Plaintiff do not show exhaustion

The Fourth Amended Complaint incorrectly asserts that the Plaintiff has exhausted the grievance procedure with respect to the alleged excessive force claim against Officer Bolton. The Plaintiff attaches one grievance, dated January 26, 2005, as evidence that he exhausted the available administrative remedies. (Doc. 22, Attachment "A"). There are two reasons Plaintiff has failed to properly exhaust his administrative remedies as to his excessive force claim. First, his grievance was not timely filed in accordance with the Inmate Grievance Procedure in place at the OCJ at the time of the Plaintiff's incarceration at that facility. Second, Plaintiff failed to properly appeal from the grievance.

Plaintiff's grievance, dated January 26, 2005, states that the excessive force incident complained of took place during his incarceration from May 1, 2003 through January 24, 2004. (See Plaintiff's Attachment "A" to Doc. 22). In accordance with the Inmate Grievance Procedure policies in effect, Plaintiff was required to file a grievance within seven days of the date of the alleged incident of excessive force. (Exhibit "B", Inmate Grievance Procedure; Exhibit "C", Affidavit of Deputy Director Lawson as used in Horn v. Sgt. Tobin, et al, 3:06cv108/LAC/EMT - will be substituted with another Affidavit from Deputy Director Lawson). Plaintiff did not file a grievance until at least one year after the alleged incident of excessive force. This

is far beyond the time guidelines provided by the grievance procedure, but just as important, the grievance does not specify that it was Defendant Officer Bolton who committed the alleged wrongdoing.

Plaintiff does not claim to have omitted any grievance from the attachments to his Fourth Amended Complaint. Accordingly, from what is attached to the Fourth Amended Complaint, it is clear that the Plaintiff failed to file a timely grievance regarding the alleged excessive force.

But even if the foregoing grievance is considered sufficient for an initial grievance of excessive force against Officer Bolton, which is not conceded, it is clear that Plaintiff failed to appeal and therefore failed to exhaust his administrative remedies. An attempt by Plaintiff to cite the institution's failure to respond as a basis for showing that he need not of appealed his initial grievance is without basis. Even if the grievance procedure were a futile exercise, Plaintiff was nonetheless required to take all available steps which he clearly did not do. Woodford, supra; Johnson, supra. Inmates, such as Plaintiff, are educated by OCJ staff that they may appeal to the next higher level of administrative review if they fail to receive a response to a grievance when they believe a response is warranted. (Exhibit "C" at ¶ 12). Despite having the opportunity to appeal, Plaintiff never did so and thereby failed to exhaust his available administrative remedies with respect to the subject of that grievance, i.e., excessive force.

In sum, Plaintiff failed to exhaust his available administrative remedies by

failing to file a timely initial grievance regarding the alleged excessive force, and by failing to properly appeal the initial grievance.

III. Qualified immunity defense is not available

Given that the issue of qualified immunity is occasionally revisited, counsel for Defendant Officer Bolton raises the qualified immunity defense in the event the United States Supreme Court or Eleventh Circuit Court of Appeals revisits the issue during the pendency of this case.

IV. Summary judgment appropriate as to claims against Sgt. Tobin

i. Summary judgment standard

In order to prevail on his motion for summary judgment, the defendant must show that plaintiff has no evidence to support his case or present affirmative evidence that plaintiff will be unable to prove his case at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986). If the defendant successfully negates an essential element of plaintiff's case, the burden shifts to plaintiff to come forward with evidentiary material demonstrating a genuine issue of fact for trial. Id. The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is "material" if it "might affect the outcome of the suit under the governing [substantive] law." Id. Accord Tipton v. Bergrohr

GMBH-Siegen, 965 F.2d 994, 998 (11th Cir.1992). Further, plaintiff must show more than the existence of a "metaphysical doubt" regarding the material facts, Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986), and a "scintilla" of evidence or conclusory allegations is insufficient. Celotex Corp., 477 U.S. at 324 (quoting Fed.R.Civ.P. 56(e)). Plaintiff must either point to evidence in the record or present additional evidence sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency. Celotex Corp., supra; Owen v. Wille, 117 F.3d 1235, 1236 (11th Cir.1997) ("Rule 56(e) ... requires the nonmoving party to go beyond the pleading and by h[is] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' "), cert. denied, 522 U.S. 1126 (1998) (quoting Celotex, 477 U.S. at 324, 106 S.Ct. at 2553 (quoting Fed.R.Civ.P. 56©), (e))); Hammer v. Slater, 20 F.3d 1137 (11th Cir.1994).

Evidence presented by plaintiff in opposition to the motion for summary judgment, and all reasonable factual inferences arising from it, must be viewed in the light most favorable to the plaintiff. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); Jones v. Cannon, 174 F.3d 1271, 1282 (11th Cir.1999). A motion for summary judgment should be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and

that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56; Celotex Corp. v. Catrett, 477 U.S. at 322, 106 S.Ct. at 2552.

ii. Officer Bolton is not a proper Defendant

The Okaloosa Department of Corrections conducted an investigation into Plaintiff's allegations of excessive force, which is summarized in a memorandum prepared by Captain C. Morash. (Exhibit "A"). Captain Morash noted that Officer Brian Bolton, the Corrections Officer alleged to have used excessive force, was not the Officer found to have used a laser pointer. Rather, an Officer not named as a Defendant by Plaintiff is noted as having used a laser pointer and as having been instructed to refrain from using it in his duties with the Okaloosa DOC. Even then, the Officer that used a laser pointer is noted to have not shined it in inmates' eyes. The memorandum concludes that there was nothing to support Plaintiff's allegations. Defendant Officer Bolton affirms that he was not involved in the incidents alleged by Plaintiff and his knowledge of Plaintiff's allegations is limited to having been made aware of the allegations. (An affidavit from Officer Bolton shall be filed as soon as it is executed by Officer Bolton).

Accordingly, Defendant Officer Bolton is entitled to summary judgment because what evidence exists shows that he did not participate in the alleged use of force on Plaintiff. The only evidence Plaintiff can point to are his own allegations. The burden is on Plaintiff to show more than the mere existence of some alleged factual dispute or some metaphysical doubt regarding the material facts. Should

Plaintiff fail to carry this burden, then Officer Bolton respectfully requests that the Court enter summary judgment in his favor with respect to Plaintiff's claim against him.

iii. Plaintiff's medical history shows that his allegations against Defendant Officer Bolton have no merit

Defendant Officer Bolton is entitled to summary judgment because there is no evidence to support Plaintiff's allegation that his eye condition is due to anything other than naturally occurring conditions.

Plaintiff has sought medical treatment over several years for his eye conditions including glaucoma, myopia, and what appears to be retinal detachment. (A composite of Plaintiff's medical records from OCJ is attached as Exhibit "D"). Despite Plaintiff's cooperation, counsel for Defendant Officer Bolton is unfortunately still in the process of collecting and analyzing Plaintiff's medical records from the several medical providers he consulted and treated with. The Court recognized the importance of Plaintiff's medical history to the analysis of potential liability and damages in this case, and included in its service orders a provision specifying that relevant medical records be included in the special report process. The Court also granted the parties' previous request for an extension of time to collect Plaintiff's medical records and include them in the special report process. (Docs. 45, 48). Defendant Bolton attempted to contact Plaintiff prior to filing another request for extension of time to file this Special Report, which was filed before this Special Report. (Doc. 51). Unfortunately, the Plaintiff could not be contacted prior to filing

the request for extension of time, nor did the Court have sufficient time to rule upon the request for extension of time prior to the running of the deadline for submitting the special report. Accordingly, because of the significance of Plaintiff's medical records to the analysis of potential liability and damages, Defendant Officer Bolton incorporates his request for an additional extension of time, and he requests leave of Court, based on the good cause expressed in the motion for further extension of time, to permit him to supplement this Special Report with additional evidence as Plaintiff's medical records become available and as may be necessary to provide the Court all of the information relevant to Plaintiff's claims.

* * * *

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished to Russell T. Neal, DOC No. 213156 Calhoun Correctional Institution 19562 S.E. Institution Drive, Blountstown, FL 32424 via U.S. Mail, and by electronic filing to Michael J. Thomas, Esq., PENNINGTON, MOORE, WILKINSON, BELL & DUNBAR, P.A., 215 S. Monroe Street, 2nd Floor, Tallahassee, FL 32301 via electronic filing this 4th day of February, 2008.

/s/ Jason B. Onacki
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